UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

LIBERTY ASHES, INC.
Employer[1]

and Case No. 29-RD-951

ROBERT PUCKHABER
Petitioner

and

LOCAL 813, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO
Union[2]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Peter Pepper, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[3] in this proceeding, the undersigned finds:

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1 The Employer's name appears as amended at the hearing.

2 The Union's name appears as amended at the hearing.

3 All references to exhibits will be abbreviated herein as follows: "Bd. Ex. #" refers to Board exhibit numbers; "Jt. Ex. #" refers to Joint exhibit numbers; "Un. Ex. #" refers to Union exhibit numbers; and "Er. Ex. #" refers to Employer exhibit numbers.

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[4]

2. The parties stipulated that Liberty Ashes, Inc., herein called the Employer, is a New York corporation, with its principal office and place of business located at 94-29 165th Street, Jamaica, New York, where it is engaged in the business of commercial (i.e., non-retail) sanitation. During the past calendar year, the Employer, in the course and conduct of its business operations, purchased and received at its Jamaica, New York facility, goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New York.

Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. Local 813, International Brotherhood of Teamsters, AFL-CIO, herein called the Union or Teamsters, is the current certified and recognized collective bargaining representative for a unit of drivers, helpers, mechanics and laborers employed by the Employer. The Union contends that no question concerning representation can be raised at this time under the "settlement bar" doctrine.

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[4] The Hearing Officer inadvertently neglected to admit the formal papers into evidence, although he correctly rejected the Union's request to conduct voir dire. Accordingly, Bd. Ex. 1 is hereby received. Furthermore, Union Exhibit 6 (notes of the Union's former counsel, Jane Lauer-Barker, regarding the parties' bargaining session on October 19, 2000) was admitted into evidence over the Employer's objections, although it constitutes hearsay evidence. Ms. Lauer-Barker was not called to testify. Nevertheless, the Employer and Union both relied on this exhibit in their briefs to make assertions regarding what happened at the October 19th bargaining session, and the Employer did not renew its

Specifically, the Union points out that the Employer agreed to recognize and bargain with the Union in settlement of certain unfair labor practice cases, which settlement was approved by the undersigned on July 28, 2000, and further contends that a "reasonable time" for bargaining had not elapsed before the instant decertification petition was filed on February 2, 2001. By contrast, the Employer contends that a reasonable time for bargaining has elapsed, and that the decertification petition should be allowed to proceed. The decertification petitioner, Robert Puckhaber, did not state his position on the record regarding the settlement bar issue.

In support of its position on this issue, the Union called its president, Sylvester Needham, to testify.

Background of related representation cases and unfair labor practice cases

I hereby take administrative notice of the following cases, which form the background to the Teamsters' certification as collective bargaining representative of unit employees, and the subsequent unfair labor practice allegations that were settled in July 2000.

Teamsters' Local 813 was the incumbent collective bargaining representative of the unit employees as of December 1990, when Laborers Local 445 (herein called Laborers) filed a petition in Case 29-RC-7747. The Teamsters intervened. That case was pending for more than seven years, due to being "frozen" pending an AFL-CIO Article XX proceeding and due to blocking unfair labor practice charges. Eventually, the then-pending unfair labor practice cases were settled and the Laborers withdrew

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objection to the exhibit. I hereby conclude that the admission of Un. Ex. 6 was harmless error. As noted below, this Decision relies on the exhibit only to a very limited extent.

their petition in February 1998. However, Case No. 29-RC-7747 was still pending in 1997, when another representation case was filed by a third union, as described below.

Local 998, United Sanitation Men of America (herein called USMA) filed a petition in November 1996, in Case No. 29-RC-8713. Despite the Teamsters' status as the incumbent and notwithstanding the then-pending representation case and unfair labor practice cases, the Teamsters union was not notified of Case No. 29-RC-8713. An election was held with only USMA on the ballot, and USMA was certified as the unit's collective bargaining representative in December 1996. In March 1997, after learning of Case No. 29-RC-8713, the Teamsters filed a motion to revoke USMA's certification, because it had not been given an opportunity to intervene, and because of the still-pending unfair labor practice charges. The Teamsters also submitted authorization cards to the Region.

In March 1998, USMA withdrew from Case No. 29-RC-8713, and the Region proceeded to schedule another election in that case, without USMA on the ballot. The continued processing of that petition was based on the Teamsters' showing of interest. In May 1998, a stipulated election agreement was approved, setting an election date in June 1998. In the meantime, a fourth union, Local 890, League of International Federated Employees (herein called LIFE) apparently intervened in Case 29-RC-8713. Both Teamsters and LIFE appeared on the ballot this time, and Teamsters won the election. The Employer filed objections alleging misconduct by the Teamsters, but the objections were later overruled. Teamsters Local 813 was finally certified on September 2, 1998.

After the certification in Case 29-RC-8713 in 1998, the Teamsters and the Employer engaged in some contract negotiations and there was a strike, the details of which will not be described here. In early 2000, the Teamsters filed a series of unfair labor practice charges against the Employer in Case Nos. 29-CA-23286, -23296, and -23358, alleging various violations of Sections 8(a)(1), (2) and (5) of the Act, including direct dealing, coercing employees to sign cards for LIFE, assisting LIFE, strike-related threats, and withdrawing recognition from the Teamsters. In May 2000, the Region decided to issue complaint against the Employer, but in late July 2000, the parties agreed to settle those unfair labor practices cases. Under the settlement, the Employer agreed to recognize and bargain with the Teamsters, and also agreed, *inter alia*, not to assist LIFE, not to engage in direct dealing and not to interrogate and threaten employees. On July 28, 2000, the Region approved the parties' settlement agreement (Jt. Ex. 1). Case Nos. 29-CA-23286, -23296, and -23358 were still pending in the "compliance" phase when the instant decertification petition (Case No. 29-RD-951) was filed on February 2, 2001.

Evidence in the instant case regarding post-settlement events

Needham testified that he was elected as president of the Teamsters on August 24, 2000. One week later, on August 30, 2000, Needham sent a letter to the Employer's general manager, Robert Shirlaw, requesting to bargain and requesting certain information (Un. Ex. 2). Specifically, the Union requested the following items: (1) a list of unit employees, including their names, dates of hire, rates of pay, job classifications, last known addresses, phone numbers and Social Security numbers; (2) a copy of all current personnel policies and procedures; (3) a copy of all fringe benefit

plans; (4) all current job descriptions for unit employees; and (5) for any benefit plans, a copy of the summary plan description, ERISA form 5500, recent financial statement, and documents showing the amount contributed by the Employer and the dates of contribution. The Employer did not respond to this letter.

The next month, on September 18, 2000, the Union's former counsel, Jane Lauer Barker, sent another letter to Shirlaw, reiterating the Union's requests to bargain and for information (Un. Ex. 3). A few days later, on September 21, 2000, the Employer's attorney, Steven Horowitz, sent a response to Lauer Barker, asking her to supply available bargaining dates in October, and stating that the Employer would begin compiling the requested information (Er. Ex. 1). At some point, the parties agreed to meet on October 19, 2000.

In the meantime, on September 25, 2000, the Region sent a letter to the Employer regarding its compliance with the settlement agreement in Case Nos. 29-CA-23286, -23296, and -23358, including copies of the "Notice to Employees" which the Employer was required to post for 60 days (Jt. Ex. 2). On September 28, 2000, the Employer signed and returned the "certification of posting" form to the Region (Bd. Ex. 3). On October 5, 2000, the Region sent a letter to the Union, advising it of the Employer's posting (Bd. Ex. 4).

On October 19, 2000, the parties attended the scheduled bargaining session. Needham, Lauer Barker and Union secretary-treasurer Richie Merola attended for the Union, whereas Shirlaw and Horowitz attended for the Employer. The attorneys, Lauer Barker and Horowitz, were the principal negotiators for each respective side. Needham, (the only witness who testified at the instant hearing) did not attend the entire bargaining

session, but rather, came and went from the room. Thus, his competency to testify about what happened at the bargaining session is somewhat questionable. In any event, Needham testified that he recalled the parties discussing the Union's last proposals and the Employer's last proposals (presumably, from their negotiations in late 1998 and 1999). Needham also recalled that Horowitz identified some of the "hot" outstanding issue that remained. There was some discussion of the Union's standard contract with many other employers in the sanitation industry (called the "industry contract").[5] Finally, Needham recalled that the Union asked about its request for information, and that the parties discussed the existence or non-existence of certain requested documents.[6] At some point, the Employer acknowledged that it continued to contribute to a USMA health plan. Near the end of the meeting, Horowitz said that the Employer would provide the requested information (to the extent that it existed). Lauer Barker stated that, as soon as the Union received the information (including copies of documents regarding the USMA health plan), she would contact the Employer again to set up more dates for negotiation.

At some point in late October 2000, the Employer sent the Union the names and addresses of unit employees, but not their dates of hire, rates of pay, phone numbers or Social Security numbers. The next month, on November 13, 2000, Horowitz sent a letter to Lauer Barker, stating that his client had provided a list of employees, but that

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5 Needham initially testified that the parties "discussed" the industry-wide contract, but he did not recall whether the Union gave any proposals to the Employer at the October 19 bargaining session. On redirect examination, in response to leading questions regarding whether the Union proposed the industry-wide contract as its proposal, Needham answered affirmatively.

6 According to Lauer Barker's notes (Un. Ex. 6, which was admitted despite its hearsay quality), the Employer stated that it did not have any written personnel policies or job descriptions, but promised to

the client was "not in possession" of its prior collective bargaining agreement with USMA. (Er.
Ex. 2). To this date, the Employer has not provided the remaining information requested, i.e., employees' dates of hire, rates of pay, phone numbers and Social Security numbers, and information regarding the USMA health plan. In his November 13 letter, Horowitz also asked Lauer Barker to advise him of possible dates for resuming negotiations.

The Union did not respond to Horowitz's letter for more than two months. It did not make any further request for the additional information which the Employer had not provided, nor did it file any unfair labor practice charges regarding its request for information. The Union did not propose any dates for resuming bargaining. In the meantime, as of late November, 2000, the 60-day notice-posting period under the settlement had expired. As of late December, Lauer Barker no longer worked as counsel for the Union.

Needham explained that, when he became Union president in August 2000, there was a backlog of more than 100 contracts that the Union needed to negotiate. Since his election, he has been working seven days per week, 13 or 14 hours per day. However, he did not take an active role in the Liberty Ashes negotiations because attorney Lauer Barker was handling it. Needham testified that, until the day of the hearing herein, he had never seen a copy of Horowitz's November 13 letter offering to resume bargaining.

On February 2, 2001 (two and a half months after Horowitz's letter), the instant decertification petition was filed. Five days later, on February 7, 2001, attorney Jennifer

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provide the requested list of unit employees, its contract with USMA, and information regarding the

Willig of the law firm of Eisner and Hubbard (the Union's new attorneys) sent a letter to Horowitz, stating that the Union was ready to continue negotiations, and asking Horowitz to contact her with available dates (Un. Ex. 4). After further correspondence, Willig sent another letter, setting a meeting date of March 15, 2001 (Un. Ex. 5). As of the date of the hearing herein, the parties were still planning to meet on March 15 to resume negotiations. The Employer has not withdrawn recognition of the Teamsters, and there is no contention that the parties reached a bargaining impasse.

Discussion

In developing the doctrine of settlement bar in representation cases, the Board has attempted to balance a number of conflicting concerns. In Poole Foundry & Machine Co., 95 NLRB 34 (1951), *enf'd* 192 F.2d 740 (4th Cir. 1951), *cert. denied* 342 U.S. 954 (1952), the Board held that where an employer and union have entered an agreement settling unfair labor practice charges, which settlement requires the employer to recognize and bargain with the union, the parties are entitled to a "reasonable time" within which to bargain, free from rival claims and petitions. *See also* Dick Bros., Inc., 110 NLRB 451 (1955); Frank Becker Towing Co., 151 NLRB 466 (1965); Interstate Brick Co., 167 NLRB 831 (1967); Los Angeles Tile Jobbers, Inc., 210 NLRB 789 (1974); and Freedom WLNE-TV, 295 NLRB 634 (1989). In these cases, decertification petitions ("RD") or rival representations petitions ("RC") were dismissed, on the grounds that a reasonable time for effectuating the provisions of the earlier settlement agreement had not lapsed. The Board's settlement-bar doctrine nevertheless attempts to balance promoting stability in collective-bargaining relationships with the employees'

USMA health benefit plan.

free choice in selecting their bargaining representative. For example in Caterair International, 322 NLRB 64 (1996), the Board pointed out that the requirement for an employer to bargain with a designated union:

> is not intended to fix a *permanent* bargaining relationship without regard to new situations that may develop.... [A]s the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.... After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.

322 NLRB at 66, citing Franks Bros. Co. v. NLRB, 321 U.S. 702, 705-6 (1944), emphasis added.[7]

What constitutes a "reasonable" time period depends on all the facts of circumstances of each case. The Board has held that reasonable time "does not depend upon the either the passage of time or the number of calendar days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished therein." Brennan's Cadillac, Inc., 231 NLRB 225, 226 (1977). In some cases, a few months of bargaining may be enough to give the recognized union a fair chance to succeed, whereas other cases may require a year.

For example, in Frank Becker Towing Co., 151 NLRB 466 (1965), the Boatmen's union was certified as collective bargaining representative in 1962, and the parties subsequently executed a contract which was scheduled to expire on March 31,

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7 Although the Caterair case cited above involved a bargaining order (not a settlement agreement), the Board uses similar standards for assessing a "reasonable time" in various scenarios establishing a bargaining relationship. *Compare* Caterair, supra (bargaining order) with MGM Grand Hotel, Inc., 329 NLRB No. 50 (1999) and Livent Realty, a Division of Livent U.S., Inc., d/b/a the Ford Center for the Performing Arts, 328 NLRB No. 1 (1999)(bar after voluntary recognition); St. Elizabeth Manor, Inc., 329 NLRB No. 36 (1999)(successor bar); VIP Limousine, 276 NLRB 871 (1985) and King Soopers, Inc., 295

1964. Nevertheless, at some point in 1963, the employer recognized the Teamsters union and withdrew recognition from the Boatmen's union, causing the latter union to file charges under Sections 8(a)(2) and (5) of the Act. On December 11, 1963, the employer and Boatmen executed a settlement agreement, wherein the employer agreed to recognize the Boatmen. In early March, 1964, when their existing contract was about to expire, the employer and Boatmen began bargaining for a new contract. Negotiations were "near completion" when, on April 1, 1964, the Teamsters filed an RC petition. In that case, the Board found that the less-than-four-month period which elapsed between the settlement agreement and the filing of the rival petition was insufficient to effectuate the purposes of the settlement.

In MGM Grand Hotel, Inc., 329 NLRB No. 50 (1999), the Board found a reasonable period of time had not elapsed after more than 11 months following voluntary recognition. MGM involved negotiations for a first contract in a 3,000-employee unit. The employer and the voluntarily-recognized union decided not to follow any existing collective bargaining agreements as models, but rather to assemble the entire contract "from scratch," using extensive employee-polling and using a complicated bargaining structure, including various subcommittees and task forces to explore various practices and proposals. The parties held more than 30 bargaining sessions from the time of recognition on November 15, 1996, to the time a decertification petition was filed on November 6, 1997. The Board, finding that the parties had made "substantial progress" in their "complex" and "fruitful" bargaining, dismissed the decertification petition. Under those circumstances -- including the large

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NLRB 35 (1989)(sequential ULP cases where, after a settlement agreement requiring recognition,

size of the unit, the complexity of the bargaining structure and issues, the parties' frequent meetings and diligent efforts, and the substantial progress made -- the Board concluded that the "reasonable time" for the recognized union's chance to bargain had not yet elapsed.

Thus, in assessing whether a reasonable period has elapsed, the Board considers such factors as whether the parties diligently pursued an agreement, how frequently they met, how much progress was made, whether this was their first contract, whether the parties reached impasse, the size of the unit, and the complexity of the issues being negotiated. Of course, the severity of the earlier unfair labor practices and the length of bargaining hiatus they caused may also be considered in assessing whether a reasonable time has passed after a settlement to effectuate bargaining. Caterair, supra, 322 NLRB at 68, fn. 16.

In the instant case, the record indicates that during the more-than-six-month period between approval of the settlement agreement (July 28, 2000) and the filing of the decertification petition (February 2, 2001), the Employer and the Union met only one time for bargaining. The bargaining session held on October 19, 2000, appears to have been a preliminary meeting, simply reviewing the pre-existing proposals without any new proposals being exchanged. There is no evidence that any progress was made on bargaining issues. Subsequently, no additional meetings were requested by the Union for more than three months after the October meeting, despite the Employer's willingness to meet, as expressed in its letter dated November 13, 2000. During that time, the Union neither followed up with the Employer regarding its request for

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employer unlawfully withdraws recognition).

information, nor filed any unfair labor practice charge regarding the request for information. In sum, almost nothing happened after the parties' single, preliminary bargaining session. It was not until after the decertification petition was filed did the Union attempt to schedule a second meeting. Under the circumstances, I find that a reasonable time had passed to give the Union a fair chance to effectuate bargaining under the settlement agreement.

Of course, I recognize the severity of the unfair labor practices alleged in Case Nos. 29-CA-23286, -23296 and -23358, and the long history of previous unfair labor practices and challenges to the Union's status as the incumbent union. I am also troubled by the Employer's failure to provide certain requested information that is presumptively relevant to the bargaining process. Nevertheless, given the lack of diligence and progress in the parties' bargaining during the relevant six-month period, extending the settlement-bar period beyond this point does not appear warranted. Unlike the negotiations in such cases cited above as Frank Becker ("near completion") and MGM (showing "diligence" and "substantial progress"), there were no bargaining sessions for more than three months before the decertification petition was filed, and the one bargaining session held prior thereto accomplished little if anything toward reaching an agreement. Thus, to allow employees to proceed to an election at this time would not disrupt a particularly fruitful bargaining process following the settlement agreement.

Cases cited by the Union in its brief, King Soopers, Inc., 295 NLRB 35 (1989) and Gerrino, Inc., 306 NLRB 86 (1992) are distinguishable. Those unfair labor practice cases raised the issue of whether each employer violated Section 8(a)(5) by withdrawing recognition from a union that was previously recognized under a settlement agreement.

In those cases, the Board found that each employer was *not* entitled to withdraw recognition from the union because a reasonable time period had not elapsed since the settlement agreement and because, despite some delays caused by the union, there was no basis for finding that the union had abandoned the bargaining unit. However, the issue here is different. In the instant case, the Employer has not withdrawn recognition from the Union, and there is no question as to whether the Employer is entitled to do so. Rather, in this representation case context, the issue is whether *employees* should have the opportunity at this time to decide whether they want continued representation by this Union. For the reasons stated above, I have found that a sufficient time has elapsed since the settlement agreement to allow employees that choice. Obviously, the Employer must recognize and bargain with the Union in the meantime and, if employees choose continued representation by the Union, the Employer must continue to recognize and bargain with the Union thereafter.

As noted above, the concept of settlement bar is not intended to fix a "permanent" bargaining relationship, but simply to give an incumbent union a fair chance to succeed under a settlement agreement, without premature challenges to its status. I conclude that the Union in this case was given a fair chance to succeed, and that the reasonable time period has elapsed since the settlement agreement. To continue to bar an election in these circumstances would give the Union an unwarranted level of protection from challenge, and would unduly deny employees' free choice in deciding whether to choose continued representation by this Union.

Accordingly, I hereby find that the parties' settlement agreement in Case Nos. 29-CA-23286, -23296, and -23358 does not constitute a bar to processing the

Petitioner's decertification petition, that a question exists concerning the representation of certain employees of the Employer, and that an election is warranted herein.

5. The parties stipulated, and I hereby find, that the following unit of employees constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, helpers, mechanics and laborers employed by the Employer at its 94-29 165th Street, Jamaica, New York facility, excluding all office clerical employees, guards and supervisors as defined by Section 2(11) of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local 813, International Brotherhood of Teamsters, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the

undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before March 21, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by March 28, 2001

Dated at Brooklyn, New York, this March 14, 2001.

/S/ ALVIN BLYER

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347-6020-5067